
MIOW AH KING

v.

RAM SINGH & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

HARUN HASHIM J

[CIVIL APPEAL NO. 59 OF 1973]

31 DECEMBER 1986

TORT: *Plaintiff bodily injured - By act of 1st defendant - Claim for damages - Negligence - Defence of volenti non fit injuria - Defence of contributory negligence.*

The plaintiff was a winch-lorry driver and worked in a timber logging area carrying logs from the logging area to the receiving station. The 1st defendant was a lorry driver carrying logs from the receiving station to the sawmill. On 10 December 1970 when the plaintiff reached the receiving station, the 1st defendant asked the plaintiff for his help to start the engine of his lorry which had broken down. The plaintiff obliged and he released the air of the a.c. pump, walked away and told the 1st defendant to start the engine. The 1st defendant did so and the fan (or part of it) became dislodged, hit the open bonnet, ricocheted and hit the plaintiff causing him bodily injury. The plaintiff sued for damages.

Held:

[1] Negligence has been proved as alleged both against the 1st defendant (as driver) and the 2nd defendant (as owner) of the lorry.

[2] As to the defence of *volenti non fit injuria*, this defence does not arise as the plaintiff had not interfered with the fan and had in fact walked away from the lorry.

[3] As to the defence of contributory negligence, this also does not arise because the plaintiff did not know and could not have known that the fan was in a defective condition.

[Judgment for plaintiff with costs. Plaintiff awarded damages with interest.]

Case referred to:

Donoghue v. Stevenson [1932] AC 562

For the plaintiff - S. Periasamy; M/s. Nahappan & Peri

For the defendants - S.F. Leow; M/s. Shearn Delamore & Co.

JUDGMENT

Harun J:

The plaintiff was a winch-lorry driver and worked in a timber logging area carrying logs from the logging area to the receiving station. The first defendant was a lorry driver carrying logs from the receiving station to the sawmill.

On 10 December 1970, the first defendant was at the receiving station. The engine of his lorry had broken down. It would not get started. When the plaintiff reached the receiving station, the first defendant asked the plaintiff for his help to start the engine. After unloading the logs he had brought in, the plaintiff obliged. He released the air of the a.c. Pump, walked away and told the first defendant to start the engine. First defendant did so and revved the engine. The fan (or part of it) became dislodged, hit the open bonnet, ricocheted and hit the plaintiff causing him bodily injury.

- a* There was some dispute as to who started the engine. It was suggested that one of the plaintiff's co-workers did so. On a review of the evidence as a whole, I find that it was more probable that the first defendant did so. It was his lorry and he was undoubtedly more familiar in starting it. There is not evidence that the third person suggested was in any way skilled in starting-up broken-down lorries. The fact that the first defendant asked for the plaintiff's assistance shows that the plaintiff was the only person who could possibly repair the engine
- b* as he is a winch-lorry driver himself with about 11 years' experience. I therefore find as a fact that it was the first defendant who started-up the engine that caused the fan to be dislodged.

- c* The fact that the plaintiff had repaired the engine is not an issue here because there is no evidence that he interfered with the fan. The cause of the engine not starting-up had nothing to do with the fan. I also find as a fact that the plaintiff had walked away from the first defendant's lorry when he was struck by the dislodged fan. There were other workers in the vicinity and anyone could have been hit. The only connection between the plaintiff and the cause of the accident was the fact that had he not repaired the engine, it could not have been started and the fan would not have been dislodged then.

- d* The only real issue in this case is one of law. The question arises whether the driver (and the owner) of a motor vehicle is liable in a claim for damages, if a component part of his vehicle becomes a flying object and causes bodily injury to an innocent bystander.

- e* This action is founded on **negligence** in particular it is alleged that negligence was caused by the first defendant and or the second defendant. The nearest authority on negligence as alleged in this case is *Donoghue v. Stevenson* [1932] AC 562 where at p. 580 Lord Atkin said:

- f* The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour. The answer seems to be - persons who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

- g* In the instant case, it was argued that it is not reasonable to foresee that the fan of a motor vehicle would be dislodged and become a flying object when the engine is started but that will be begging the question when the duty of care begins and ends. In my view, the onus is on the defendants to show that they have taken all reasonable care to ensure that their vehicles are safe and not a danger to others. There is no evidence whatsoever why the fan became dislodged or that one of the blades broke away to become a missile. In fact there is no clear evidence which of the two things occurred. The only reasonable inference is that the fan was in such a state of disrepair that it was a patent defect because it became dislodged or came apart when the engine was started. That surely is a clear case of negligence. According to the defendants the lorry was sent regularly every six months to the Registrar & inspector of motor vehicles (RIMV) to be tested for road-worthiness but there is no evidence what sort of tests were in fact conducted. According to the first defendant during the five months immediately preceding the accident, the lorry had not been sent to the RIMV. It was said that the lorry was checked weekly by a mechanic. Unfortunately this mechanic did not give evidence as it was said he had left the employment and could not be traced. Be that as it may, at a salary of RM350 per month, he could not have been a very skilled mechanic. The lorry was five years old at the time and subject to regular and heavy use. There is no evidence that the fan had been recently changed or that it had been
- h*
- i*

checked. I am satisfied that the defendants have not discharged the burden cast upon them that they have taken reasonable care to ensure that every component part of the engine of the lorry was intact and securely fitted. I accordingly find that negligence has been proved as alleged both against the first defendant (as driver) and the 2nd defendant (as owner) of the lorry.

a

As to the defence of *volenti non fit injuria*, I hold that as the plaintiff had not interfered with the fan and had in fact walked away from the lorry, this defence does not arise.

b

As to the defence of contributory negligence, this does not arise also because the plaintiff did not have know and could not known that the fan was in a defective condition.

Assessment of damages

Special damages

c

Travelling expenses for wife during the three months plaintiff was in hospital and thereafter as outpatient = RM500

Loss of earnings - six months from date of injury @ RM400 per month = RM2,400.

General damages

The plaintiff was in hospital from 10 December 1970 to 28 March 1971.

d

Injuries

5 inch deep laceration across the left shoulder extending entero-posteriorly -

(a) Brochial plexus severed - nerves to arm severed.

(b) Branch of subclavin vein severed - vein at root of neck.

(c) Latissimus dorsi lacerated - side muscle of chest - back portion.

(d) Scalenus anterior and posterior lacerated - neck muscle from the jaw down to the shoulder.

e

(e) Trapazius lacerated - shoulder muscles.

Fracture of 1, 2, 3 & 4th ribs on the left side posteriorly.

Permanent injuries

Scar on shoulder. Most muscles have gone - nerves damaged - affecting right through left arm to tips of fingers. Left shoulder lower than right shoulder. Weakness of left arm and unable to raise it. It is unsafe for him to be driving a motor vehicle again. These injuries are permanent.

f

For pain, suffering and loss of amenities, I award RM15,000.

For loss of future earnings - I accept that his earnings at time of accident was RM400 per month. He found employment first at RM150 p.m. and subsequently at RM170 as he could no longer drive a winch-lorry. I would assess the loss at RM200 p.m. He was 30 years old at time of the accident. I hold that a multiplier of 14 years is reasonable in the circumstances and would make an award of RM24,000.

g

There will therefore be judgment for the plaintiff with interest at 3% on special damages from date of accident to date of judgment; 6% on general damages for pain, suffering and loss of amenities from date of writ to date of judgment and thereafter at 8% on the judgment sum to date of realisation and costs.

h

Also found at [1987] 1 CLJ 482

i